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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

10-cr-367 (KBF)

5 JOHNNY NUNEZ GARCIA,

6 Defendant.

7 -----x  
8 New York, N.Y.  
9 November 8, 2017  
9:50 a.m.

10 Before:

11 HON. KATHERINE B. FORREST

12 District Judge

13  
14 APPEARANCES

15 JOON H. KIM  
16 Acting United States Attorney for the  
17 Southern District of New York  
18 BY: ALINE FLODR, ESQ.  
19 MICHAEL FERRARA, ESQ.  
20 Assistant United States Attorneys

21 ANDREW FRISCH, ESQ.  
22 Attorney for Defendant

23 Also Present: Dagoberto Orrantia  
24 David Mintz  
25 Spanish Interpreter  
Colleen Geier  
Paralegal, U.S. Attorney's Office

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1 (In open court)

2 THE CLERK: In the matter United States of America v.  
3 Johnny Nuñez Garcia, 10-cr-367.

4 Counsel, please state your names for the record.

5 MS. FLODR: Good morning, your Honor. Aline Flodr and  
6 Michael Ferrara on behalf of the United States. And also at  
7 counsel table is Colleen Geier.

8 MR. FERRARA: Good morning.

9 THE COURT: Good morning.

10 MR. FRISCH: Good morning, Judge. For Mr. Garcia,  
11 Andrew Frisch.

12 THE COURT: All right. Good morning, Mr. Frisch.

13 And the Court notes that Mr. Garcia is here and  
14 present in the courtroom. Good morning.

15 THE DEFENDANT: Good morning.

16 MR. FRISCH: If I could speak for the record,  
17 Mr. Garcia advises me that English is fine. He speaks English  
18 well. I have been able to communicate with him, with the  
19 interpreter being here just in case as a help.

20 THE COURT: Thank you.

21 So let me just see. Mr. Garcia, he has, I see, the  
22 equipment in his hand. And when he needs to, you can listen to  
23 it as much as needed. It's important that you hear and  
24 understand everything.

25 MR. FRISCH: Your Honor, Mr. Garcia has asked if it's

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1 possible for his sister, who is in the audience, to be given a  
2 set of headphones so she can follow along.

3 THE COURT: Yes. If we have an extra set, that's not  
4 a problem.

5 All right. So I see the interpreter is giving a set  
6 to his sister.

7 OK, folks. So let's get ourselves oriented here. We  
8 are here on the petition under 2255 by Mr. Garcia. I have set  
9 this down for a hearing on one issue, which is whether a notice  
10 of appeal, whether Mr. Garcia had asked for a notice of appeal  
11 to have been filed. But in preparing for this hearing, I now  
12 think we might more appropriately go in another direction.

13 I will give you some background on how I got here,  
14 which is that I attended a Bureau of Prisons session here in  
15 the courthouse that was run really for probation last week --  
16 about a week ago, Joe, right? No, a week ago exactly.

17 At that session, the Bureau of Prisons spent some  
18 time -- these were individuals who do computation -- on  
19 5G1.3(b), and went through this in some detail. And frankly I  
20 learned things during that session and it made clearer to me  
21 how to handle certain things under 5G1.3(b).

22 In preparing for this hearing, I noted that  
23 Mr. Di Chiara, who was Mr. Garcia's attorney at the time of the  
24 resentencing, had explicitly raised 5G1.3 as an issue that  
25 needed to be addressed in the judgment. And we had some very

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1 brief back-and-forth at the sentencing. I then had the  
2 government and defense counsel confer, and I got some language  
3 for that issue. However, I neglected a very important piece of  
4 it, and this is a clerical omission but an important one, which  
5 is, under 5G1.3(b), as I believe Mr. Di Chiara had indicated on  
6 the transcript, the sentence needed to explicitly state that it  
7 be concurrent with the state sentence. That's mandatory, when  
8 it's related conduct. And as we know, to sort of go back in  
9 time, the defendant, Mr. Garcia, been arrested by the state in  
10 January of 2010. He then was convicted of a firearm charge in  
11 July of 2010. Meanwhile, he was brought into federal custody  
12 by a writ in May of 2010.

13 Now, we did take care of the 5G1.3 reduction for the  
14 time served between the initial arrest and the conviction by  
15 the federal court in 2013 in the J&C. We reduced his sentence  
16 by 27 months. And that was appropriate. However, what I did  
17 not do, although it should have been done and was intended to  
18 have been done, was to explicitly state that the remainder of  
19 the sentence, which is some period of time that will be  
20 calculated by the BOP but it could be in the vicinity of,  
21 again, two years, that that must run concurrent.

22 The failure to do that, I now understand better from  
23 the BOP, will result in it being consecutive. So an inability  
24 to actually fix that in any other way would prejudice  
25 Mr. Garcia. It is mandatory that that occur, in the sense that

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1 5G1.3 is a mandatory provision; it requires reduction under  
2 5G1.3(b). It also requires a concurrent state sentence, if  
3 it's related to the federal conviction, and, here, we have that  
4 overlap.

5 So I believe that the appropriate thing to do right  
6 now is to simply state -- to reissue, under Fed.R.Crim.P. 36, a  
7 new J&C, which will state explicitly Count One is 120, Count  
8 Two is the reduced amount -- I've got it all set out -- and  
9 that it's to run 97 months for Count Two, and that the sentence  
10 should run concurrent with the undischarged remainder of the  
11 state sentence, because otherwise, as I now have an appeal, he  
12 will not go to the transcript. And Mr. Di Chiara was quite --  
13 was explicit, I think, in the 5G1.3 meeting, to be taken into  
14 account, and that was certainly everyone's intent.

15 So what I would propose to do is to do a revised J&C,  
16 under Rule 36. That will then trigger a new notice of appeal.  
17 Mr. Frisch, I suggest that you confer and get that filed today,  
18 if that's what the defendant still would like to do, but I  
19 think that would actually take care of this issue.

20 I frankly don't think any of the bases of appeal were  
21 particularly strong. I don't want to indicate in any way, at  
22 all, that I think that there was any issue that was going to be  
23 successful for Mr. Garcia on appeal. However, if he would like  
24 to file a notice of appeal, he could do so.

25 I will also say, this will not change anything at all

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1 about what I'm about to do, but the letter that was handed up,  
2 that was handed in, is odd. It seems to be conveniently worded  
3 to suggest issues that one wouldn't prospectively have  
4 anticipated. But let's put that to the side.

5 Do you folks agree that this omission under Rule 36  
6 should be taken care of in the manner that I have suggested,  
7 retriggering the right to appeal? Let me talk to the  
8 government. Ms. Flodr?

9 MS. FLODR: Yes, your Honor. Based on what you have  
10 explained to us, we think that that's the appropriate way to  
11 go.

12 THE COURT: All right. Mr. Frisch?

13 MR. FRISCH: It makes sense to me, Judge, yes.

14 THE COURT: All right. So let's do that. What I will  
15 do is be crystal clear. This could save the defendant,  
16 depending on how the BOP -- I don't know how they have  
17 calculated the time, but it could save a substantial chunk of  
18 time if they've done a consecutive sentence. Let's do that.

19 That then moots the current petition, because it will  
20 be a brand-new J&C, which is the result that was effectively  
21 sought and would have been obtained in the first place. That  
22 was the only issue that was live.

23 So I don't know that there is anything else to do  
24 today. I will issue this today. And we can proceed to papers.

25 Mr. Di Chiara, I don't think there's any more need for

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1 you to have to be here.

2 MR. DI CHIARA: Thank you, Judge.

3 THE COURT: All right. Thank you, sir.

4 Anything further?

5 MS. FLODR: Nothing from the government, your Honor.

6 MR. FRISCH: No, your Honor. It is my intention,  
7 based on Mr. Garcia's instructions, to file a notice of appeal,  
8 based on the protocol your Honor announced today.

9 THE COURT: All right. Thank you, Mr. Frisch.

10 We're adjourned.

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